United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1041

To be argued by
FEDERICO E. VIRELLA, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1041

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED LEAMOUS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Alfred Leamous appeals from a judgment of conviction entered on March 12, 1974, in the Southern District of New York, following a four day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 74 Cr. 46, filed January 17, 1974, charged Alfred Leamous, Beau Ray Fleming, James Brown and Lucille Tezzano in Count One with conspiracy to distribute narcotic drugs and in Count Two with the distribution of 67 grams of cocaine on October 12, 1973. Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(A), and 846.

On March 6, 1974, trial commenced as to the defendants Leamous and Fleming * and concluded on March 12, 1974, with their conviction on Count One and their acquittal on Count Two.

On July 15, 1974, Leamous was sentenced to a term of ten years imprisonment and three years special parole.**

Leamous is currently serving his sentence.

Statement of Facts

A. The Government's Case

The evidence at trial established that Special Agent Adam Mangino, while posing as a purchaser of narcotics, telephoned Lucille Tezzano on October 3, 1973 and discussed the purchase of one-eighth kilogram of cocaine.*** On October 11, 1973 at 3:30 P.M. Mangino telephoned Tezzano again and asked her if she could still supply a quantity of cocaine. Tezzano replied that her suppliers were scared and that one-eighth of a kilogram might cost $3,300 (Tr. 16-20, 66-67). Immediately after this telephone conversation, Tezzano contacted James Brown and asked him if he knew anyone that had any cocaine. Brown agreed to look for a source for cocaine and to meet Tezzano later at her home (Tr. 112, 118-119). At approximately 4:45 P.M., Mangino

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* Prior to the trial Brown pled guilty and thereafter testified on behalf of the Government. Brown was later sentenced to an imprisonment for a year and a day, to be followed by three years special parole. Tezzano, a fugitive at the time of trial, was apprehended and pleaded guilty to Count One on May 24, 1974. Tezzano was sentenced on July 15, 1974 to imprisonment for a year and a day, to be followed by three years special parole.

** On April 16, 1974, Fleming was sentenced to five years imprisonment, to be followed by three years special parole. Fleming has not appealed.

*** These conversations were recorded pursuant to a judicially authorized wiretap on Tezzano's phone.

telephoned Tezzano, who told him that she had obtained a source for the cocaine and that he should meet her at her apartment that same evening (Tr. 18-19).

At approximately 5:30 or 6:00 the same day, Brown arrived at Tezzano's apartment, where he telephoned Beau Ray Fleming (Tr. 120, 114-115). In the course of this conversation, Brown made arrangements to bring Tezzano to Fleming's office (Tr. 114-115). Shortly thereafter, Fleming phoned Brown at Tezzano's house to confirm their scheduled meeting (Tr. 120); Brown then left Tezzano's house and took a taxi to Fleming's office. At approximately 8:00 P.M., Special Agent Mangino, pursuant to his arrangement with Tezzano, arrived at her apartment and was informed by Tezzano that she wanted him to give her the money for the cocaine (Tr. 20). Tezzano and Mangino proceeded to Gleason's Bar, where they continued to discuss the proposed drug transaction. Finally, Mangino gave Tezzano the $3,300 the serial numbers of which he had previously recorded (Tr. 22).

After instructing Mangino to wait at Gleason's Bar, Tezzano went to Fleming's office, where she met Brown in the waiting room. Shortly after her arrival, Fleming emerged from his office and escorted Tezzano inside (Tr. (Tr. 121-122). Approximately 10 minutes later, Tezzano reappeared in the waiting room and suggested to Brown that they go out to have something to eat. Brown replied that he had no money, but Tezzano said she would pay since she had quite a bit of money on her (Tr. 122). Tezzano and Brown went across the street to a restaurant and waited. Nearly two hours later, Fleming's secretary came to the restaurant and told Tezzano and Brown that Fleming would meet them at a West 96th Street bar known as Rust Brown's (Tr. 75-76, 122-123).

Pursuant to Fleming's instructions, Tezzano and Brown took a cab to Rust Brown's, where they met Fleming. At 12:15 A.M. Fleming took Tezzano and Brown to the apart-

ment of Alfred Leamous (Tr. 76-77, 124-127). Fleming knocked on the door, and they were invited in. Shortly after their arrival Leamous approached Brown and asked to speak to him. However, Tezzano interjected "No, you want to speak to me" (Tr. 127). Tezzano and Leamous went into the bathroom, closing the door behind them. Ten minutes later Tezzano emerged from the bathroom, sat down next to Brown, and gave him three one hundred dollar bills. At approximately 12:30 A.M., Mangino, who was still waiting at Gleason's Bar, received a telephone call from Tezzano and was told that he would get the cocaine within the next few minutes (Tr. 22).* At about 1:00 A.M., Brown and Tezzano left Leamous' apartment and returned to Rust Brown's Bar (Tr. 77, 127-130).

At Rust Brown's, Tezzano told Brown she was going to phone "Adam"** and that Brown should give him the "package" when he arrived. Tezzano then passed the cocaine to Brown under the table and went to make the phone call.*** Brown took the package and placed it behind the toilet in the bathroom (Tr. 130-132).

At 1:45 A.M. Mangino arrived at Rust Brown's Bar, where he was escorted to the bathroom by Brown and told that the cocaine was located behind the toilet. Brown then left the bathroom. Mangino subsequently returned to the dining area where Tezzano and Brown were seated and told them he couldn't find the cocaine. Brown again escorted Mangino to the bathroom and pointed out to him the exact location of the cocaine. Mangino took the cocaine**** and left (Tr. 24-25, 131, 132) (GX 1, 1B).

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* Mangino received similar phone calls from Tezzano at 9:15 and 9:45 P.M.

** Mangino's first name.

*** At 1:15 A.M. Mangino received a phone call from Tezzano saying that she had the cocaine and that he should meet her at Rust Brown's Bar (Tr. 22-23).

**** The cocaine was determined upon analysis to be 16% cocaine hydrochloride and the balance lactose.

Shortly thereafter, Tezzano and Brown left the bar. They were arrested by surveillance agents as they tried to leave the area in a taxi. Upon their arrest, three one hundred dollar bills the serial numbers of which had been previously recorded by Mangino were recovered from Brown (GX 3). Six recorded one hundred dollar bills were found on Tezzano (Tr. 78-79) (GX 8).

When Fleming was searched after his arrest the next day, the agents recovered another one hundred dollar bill which was previously recorded (GX 4). A number of slips of paper with Leamous' phone number and name on them was also found (Tr. 80, 82) (GX 7).

At the time of Leamous' subsequent arrest at his apartment, the agents uncovered two one pound containers of lactose, a dilutant of narcotics (Tr. 85) (GX 5).

B. The Defendant's Case

Leamous presented no evidence.

Fleming took the stand in an effort to prove that his purpose in visiting Leamous was to assist him in writing a book. Fleming denied making a phone call to Tezzano's apartment (Tr. 176). He testified that he met with Brown and Tezzano in the waiting room of his office, but that no private meeting with Tezzano took place in his office (Tr. 180). He admitted introducing Brown and Tezzano to Leamous, but claimed that he took them to Leamous' apartment only to avoid having them wait for him at his office (Tr. 182-183).

Fleming testified that the one hundred dollar bill in his possession upon arrest was given to him by Brown at Leamous' apartment as the result of Brown's indebtedness to him (Tr. 184).

Fleming's office secretary took the stand in an effort to further substantiate Fleming's denial of a meeting with Tezzano in his office. She testified that Fleming had advised her that he was going to Leamous' apartment to assist him in the publication of a book (Tr. 215-216). Two character witnesses were also called in Fleming's behalf (Tr. 210-213).

C. The Government's Rebuttal Case

James Brown on being recalled to the stand denied giving Fleming a one hundred dollar bill at Leamous' apartment or at any time on the night of October 11, 1973 (Tr. 231).

Alexander Smith, an agent for the Drug Enforcement Administration, testified that he monitored phone conversations at Tezzano's apartment on the evening of October 11, 1973 which included an incoming call from Fleming to Brown (Tr. 232).

ARGUMENT

POINT I

There was more than sufficient evidence of Leamous' participation in the conspiracy charged.

Leamous contends that the evidence was insufficient for his conviction for conspiracy to distribute cocaine. His argument appears to be that, first, there was no evidence of any criminal activity on his part and, second, even if there was, it was insufficient to establish his participation in the conspiracy charged, *United States* v. *Reina*, 242 F.2d 302 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957). These contentions are without merit.

As to the first contention, there was overwhelming proof of the existence of a conspiracy to sell an eighth of a

kilogram of cocaine to Agent Mangino. Mangino's original request for the cocaine had been to Tezzano, who had in turn contacted Brown and requested him to locate a source, which Brown agreed to do. Brown immediately contacted Beau Ray Fleming and arranged for a meeting later that night at Fleming's office. Brown and Tezzano proceeded separately to Fleming's office, Tezzano stopping on the way at a bar to pick up the $3,300 from Agent Mangino and instruct him to await her phone call that she had the cocaine. Tezzano then met with Fleming alone in his office while Brown remained in the waiting room. After Tezzano's meeting with Fleming she and Brown waited at a restaurant, where they were met two hours later by Fleming's secretary and told to meet Fleming in a bar. From this rendezvous Fleming, Brown and Tezzano went to Leamous' apartment and met Leamous. After that meeting, which will be discussed in detail hereafter, Tezzano and Brown proceeded together to a bar, where Tezzano passed a paper bag containing the cocaine to Brown and called Agent Mangino, who joined Brown and Tezzano shortly thereafter and received the cocaine.

Given this evidence, it is clear beyond any doubt that a conspiracy existed between Tezzano, Brown and Fleming to supply narcotics to Agent Mangino. ". . . [O]nce a conspiracy is shown, only slight evidence is needed to link another defendant with it . . . [citations omitted]", *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States* v. *Brausch*, 505 F.2d 139, 148 (7th Cir. 1974), (Mr. Justice Clark), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975); and, while the evidence against Leamous was circumstantial, it was by no means slight. In their quest for the cocaine for Agent Mangino, Tezzano and Brown first met with Fleming at about 9:00 P.M., waited nearly two hours at a restaurant for Fleming to make arrangements, and then, with Fleming leading the way, proceeded to Leamous' apartment at about 12:15 A.M. All of the evidence offered at trial by the

Government suggests that the purpose of this visit by Tezzano, Brown, her connection, and Fleming, Brown's connection, to Leamous that evening was to obtain the cocaine that Agent Mangino was at that very moment waiting for at Gleason's Bar. After brief introductions at Leamous' apartment, Leamous approached Brown and asked to speak to him, but was told by Tezzano, whose customer Agent Mangino was, "No, you want to speak to me." Tezzano and Leamous, apparent strangers to each other until that night, then retreated to the bathroom, shut the door, and remained there alone for ten minutes.* When they emerged, Tezzano promptly handed Brown a 10% cut of Agent Mangino's "buy" money, substantial evidence that the cocaine had just been acquired.** At 12:30 A.M. Tezzano telephoned Mangino and said that he would get the cocaine in a few minutes. Tezzano and Brown left Leamous' apartment together at about 1:00 A.M. and went to the Rust Brown's Bar. There, after a drink, Tezzano exhibited the cocaine for the first time and asked Brown to deliver it to the Agent, whom she telephoned at about 1:15 A.M. and told that she had the cocaine. Delivery was accomplished shortly thereafter. All of this, particularly when coupled with the discovery, upon a search of Leamous' apartment several days later, of two cans of lactose, the same kind of narcotics dilutant used in the cocaine Agent Mangino received from Tezzano, was more than enough evidence from which the

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* The Government's view of the evidence is, of course, that Leamous handed over the cocaine to Tezzano while closeted with her in the bathroom. Rail though he will at the quantity and quality of the Government's evidence at trial, Leamous offers no alternative explanation, hardly a surprise given the circumstances.

** Small amounts of Agent Mangino's money were also found on Tezzano and Fleming when they were arrested, and, in addition, the agents found three slips of paper with Leamous' first name "Al" and telephone number in Fleming's possession.

jury might conclude Leamous' criminal participation in the conspiracy as the source of Tezzano's cocaine.* *E.g.*, *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974); see also *United States* v. *Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. at 2141-2143; *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973), *cert. denied*, 414 U.S. 1004 (1974); *United States* v. *Terrell*, 474 F.2d 872, 875-876 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).**

Leamous' second argument is that even assuming that the evidence showed that Leamous provided the cocaine to

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* Judge MacMahon was of the same view. In denying the defense motions for judgments of acquittal at the close of the Government's case, he said:

> "I will deny your motion, I think, prima facie the Government satisfies its burden of proof at least of showing me that there are facts from which reasonable men could find beyond a reasonable doubt that Leamous did pass the narcotics to the girl while they were in the bathroom. I think there is evidence from which a jury could find that." (Tr. 170).

** Judge Friendly's words in *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), are particularly apposite here:

> "In passing on the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none. To be sure, the defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version . . ." [fn. omitted].

Tezzano, such an "isolated act" is insufficient to support his conviction. For this proposition, Leamous relies on *United States* v. *Reina, supra,* and *United States* v. *Stromberg*, 268 F.2d 256 (2d Cir. 1959), *cert. denied,* 361 U.S. 863 (1959). This contention is equally without merit. More recent authority in this Circuit, explaining and harmonizing the cases which have followed or distinguished *Reina* and its progeny, makes clear that the sufficiency of a "single act" to warrant a conviction for conspiracy turns on the nature and scope of the conspiracy, the role of the complaining defendant in the conspiracy, and his relationship to and knowledge of the other conspirators and their activities. *United States* v. *Torres*, 503 F.2d 1120, 1123-1124 (2d Cir. 1974). Here the conspiracy charged was small in membership—Tezzano, Brown, Fleming and Leamous, and Leamous was the supplier of narcotics. Second, while the conspiracy was charged in the indictment to have existed from the end of June, 1973, up to the date of its filing in January, 1974, the overt acts charged and the proof at trial established that the conspiracy charged and proven related solely to the eighth of a kilogram sale to Agent Mangino on October 12, 1973. Finally, Leamous was entirely familiar with the other participants and their roles, for all three of the other conspirators gathered in Leamous' apartment in the early hours of October 12, having been brought there by Fleming, and Tezzano, whose customer Agent Mangino was, purchased the cocaine from Leamous directly. All of this evidence was more than adequate, under *Torres*, to support Leamous' conviction for the conspiracy charged and proven.

POINT II

There was no error in the trial judge's supplemental instructions to the jury.

After the jury had commenced its deliberations, it sent in a note, inquiring, among other things, "As far as this case is concerned, can either defendant be convicted of conspiracy and not of possession?" The trial judge's response to the jury in open court was:

> "I would say no, not on the evidence in this case, not on the evidence in this case. . . . I should say, legally, as a technical matter, you could, but it would be an inconsistent verdict on your part. The juries have a right to be inconsistent if they want to be." (Tr. 306)

Leamous' counsel voiced no objection to this instruction below.

On appeal, Leamous objects to the instruction, not on the ground that it inaccurately reflected the evidence or the law, but apparently because the trial judge used the word "inconsistent", rather than "repugnant", as Leamous now says he should have. Precisely what the talismanic force of the word "repugnant" is Leamous does not disclose, either by explanation or citation. In any event, whatever the present argument, it is foreclosed both by the failure to raise it below, *United States* v. *Pinto*, 503 F.2d 718, 723-724 (2d Cir. 1974), and by recent authority in this Circuit which conclusively rejects what seems to be the argument now made, *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975); *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).

POINT III

There was no error in the Government's opening statement and summation.

Leamous charges that the Government's opening remarks and summation were substantially prejudicial and resulted in obtaining of his conviction by improper methods. The contention is without merit.

The Government's opening statement and summation remained within the bounds of permissible argument. Contrary to the summation arguments condemned in *Berger* v. *United States*, 295 U.S. 78 (1935), cited by Leamous, the arguments contained in the Government's summation were limited to logical inferences from the evidence in the record. And at no time did the Assistant United States Attorney place his personal integrity behind the summation arguments to the jury.* Specifically, with respect to the circumstantial evidence against Leamous, the Government properly argued to the jury the logical inference that Leamous gave Tezzano the cocaine when the two were alone together for ten minutes in the bathroom with the door closed, an inference which the trial judge concluded a jury could find from the evidence presented (Tr. 170, 253), particularly since Tezzano gave Brown $300 from the money given to her by Agent Mangino for the acquisition of the cocaine when she came out of the bathroom and thereafter passed him the cocaine to deliver to Mangino. It is clearly apparent, therefore, that the Government's statements were strictly within the bounds of permissible comment and, more important, were supported by the evidence.

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* The Government's statements can hardly have made a consequential impact on the jury particularly when contrasted to Leamous' summation: "It is my opinion that the circumstantial evidence is meager and should not form a basis for taking away the presumption of innocence" (Tr. 235).

Additionally, Judge MacMahon's charge to the jury clearly instructed them that it was their memory of the evidence that controlled, that it was their exclusive function to decide where the truth lay and which witnesses to believe, and that they were not bound to believe unreasonable statements or accept testimony that defied their common sense and intelligence (Tr. 263-265).

In any event, Leamous' claims of error in the Government's summation are foreclosed by his failure to object to the Government's summation below. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 238-239 (1940); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971).*

POINT IV

The Trial Court's instruction regarding reasonable doubt was adequate and proper and the defendant is precluded from seeking a review of the instruction.

Leamous asserts that the trial court's instruction and definition of reasonable doubt was plain error. There was no error, "plain" or otherwise.

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* There is a noticeable absence of any objections from Leamous during the Government's summation. The absence becomes more striking since in its opening statement the Government submitted what it would prove and through which witness such proof would come in. Having already seen and heard the evidence during the trial, Leamous never objected to the Government's arguments based on the evidence and the reasonable inferences which could be drawn therefrom. Thus, one can reasonably infer that if an experienced defense counsel failed to object to what is now argued as "prejudicial and improper methods" by the Government, the jury, surely, was unable to grasp these so-called "methods" in reaching its verdict.

The trial court gave a charge on reasonable doubt (Tr. 270-271) which was clear, accurate and permissible in every respect. *E.g., United States* v. *Heap*, 345 F.2d 170, 171 (2d Cir. 1965); *Holland* v. *United States*, 348 U.S. 121, 140 (1954). Moreover, before the charge to the jury, Leamous neither submitted no request to charge on reasonable doubt to the trial court, nor did he take an objection to the trial court's reasonable doubt charge after it had been given. Accordingly, he is precluded from seeking a review of the reasonable doubt instruction, which obviously was not "plain error" or indeed, error of any kind.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FEDERICO E. VIRELLA, JR.,
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* Not surprisingly, Leamous' assertions of "plain error" are unencumbered by any citations of decisional authority.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FEDERICO E. VIRELLA, JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of MAY, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

H. HOWARD FRIEDMAN, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Federico E. Virella, Jr.
FEDERICO E. VIRELLA, JR.

Sworn to before me this
19th day of May, 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977